Supreme Court, U.S.
F I L E D
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1708

In the Supreme Court Of The United States

OCTOBER TERM, 1989

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

Of Counsel
Professor Scott C. Whitney
1307 N. Kirkwood Rd.
Arlington, VA 22201
(703) 525-5571

Steven R. Perles*
Stang & Perles
1629 K St., Suite 601
Washington, D.C. 20006
(202) 223-5730

Joan E. Teplow
400 S. Ramona Ave.
Suite 206
Corona, CA 91719
(714) 734-3820

*Counsel of Record

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On April 29, 1989 petitioners Spawr Optical Research Inc., Walter J. Spawr, and Frances Spawr submitted to this Court their petition for a writ of certiorari to review the judgement of the Court of Appeals for the Ninth Circuit entered in this case on December 29, 1988. On July 26, 1989, the Solicitor General filed his Brief for the United States in Opposition [hereinafter, Brief in Opposition]. Petitioners are aware that only unusual circumstances justify submission to this Court of a brief in reply to that of the Solicitor. Petitioners respectfully submit that two such unusual circumstances exist in the present case.

I.
THE SOLICITOR'S BRIEF IN OPPOSITION DOES NOT EFFECTIVELY ATTACK OR DISPUTE THE BASIC GROUNDS UPON WHICH PETITIONERS BASE THEIR PETITION FOR CERTIORARI

The Solicitor's Brief in opposition does not effectively attack or dispute the basic grounds upon which petitioners base their petition for certiorari:

First, petitioners based their plea for a writ of certiorari on the premise that the decision by the divided panel of the Ninth Circuit in this case established a new interpretation of the Export Administration Act of 1969, *as amended*, [hereinafter, the EAA or the Act] as to the burden of proof the government must shoulder in criminal prosecutions under the Act. The petitioners asserted that Judge Pregerson, dissenting, was correct when he held that the majority had misconstrued the EAA when it held that the Secretary of Commerce (not the judge and/or jury) had plenary unreviewable power to make the guilt-determinative finding of fact whether a commodity or technology was in fact listed on the Commodity Control List [hereinafter, the CCL] at the time it was exported.

The Solicitor's Brief in Opposition does not contradict petitioners' claim. Indeed, the Solicitor explicitly states, "We do not subscribe to that portion of the Court of Appeals' reasoning which suggests that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity." Brief in Opposition at 20. The Solicitor also concedes that "The Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive . . . ." *Id.*, at 21.

This is precisely the point that is being made by the petitioners, by Judge Pregerson and by the *Amici* who have filed briefs in support of this petition for certiorari. The divided panel of the Ninth Circuit has enunciated as the law of that circuit an unqualified judicial interpretation of the EAA which

absolves the government from proving beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. The controlling precedent in the Ninth Circuit, unless it is reviewed and reversed by this Court, will be that once the Secretary asserts the commodity was listed on the CCL at the time of export, this is no longer a "triable issue," but rather:

> Right or wrong, the trial court must accept this determination as a matter of law. The government need not establish independently at trial, as an element of the charged-offenses beyond a reasonable doubt, that the Spawrs' mirrors here were included on the CCL and therefore subject to the licensing requirement.

App. 12(a).

The Solicitor seeks to brush aside this crucial reality by stating, "Although the Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive, its analysis fully supports the narrower proposition that disposes of this case, which is that the particular issues petitioners seek to raise would intrude on judgements reserved for the Secretary." Brief in Opposition at 21.

The point is that the divided panel *did* overstate the scope of the issues "reserved for the Secretary" and as a result established a sweeping precedent that would absolve the government from having to prove beyond a reasonable doubt the key, guilt-determinative element of the crime, *i.e.* that the commodity or technology was in fact listed on the CCL at the time it was exported. The fact that the divided panel *might* have produced a "narrower" decision and thereby avoided what the Solicitor acknowledges to be an "overstatement" of "the nature of the issues on which the Secretary's determination is conclusive" is irrelevant. The reality is that the divided panel did not do so. Instead, it made a sweeping decision which

construes the EAA in a manner that suffers from serious constitutional infirmities.

The second basis upon which petitioners based their plea for a writ of certiorari is that this novel interpretation of the EAA by the divided panel conflicts, *inter alia*, with *United States v. Gregg*, 829 F.2d 1430 (1987), in which the Court of Appeals for the Eighth Circuit interpreted the EAA to require the government to prove beyond a reasonable doubt that the commodity or technology in question was in fact listed on the CCL at the time of the export. The Solicitor in a single sentence in footnote 15 misstates or misinterprets the holding in *Gregg* which he claims, without benefit of supporting analysis, to be "consistent" with his view of the Government's burden of proof.

What, precisely, constitutes the Solicitor's view of the government's burden of proof is unclear. At page 11 of the Brief in Opposition the Solicitor alleges that "the government was required to prove that the laser mirrors that petitioners exported to the Soviet Union were included within the portion of the Commodity Control List that specified the commodities to which the validated licensing requirement applied." Yet, the issue of whether the mirrors were listed on the CCL is precisely the issue which the divided panel held not to be a "triable issue." It is the issue which the Solicitor and the divided panel hold to be one of the issues "on which the Secretary's determination is conclusive." The Solicitor in the same footnote 15 exhibits similar confusion with respect to *United States* v. *Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983), which in fact is completely consistent with *Gregg*, 829 F.2d 1430, and in conflict with the holding of the divided panel in the instant case. As Judge Pregerson points out, the court in *Moller-Butcher*, 560 F. Supp. 550, "makes clear the distinction between judicial review of (1) whether the Secretary actually did place a commodity on the CCL - a question of fact - and (2) whether the Secretary should have placed the commodity on the

list - a question of advisability." App. 14(a). The Solicitor in footnote 15 appears to have blurred this distinction just as the divided panel did. In any event a fair reading of *Gregg* , 829 F.2d 1430 (and *Moller-Butcher*, 560 F.Supp. 550) compels the conclusion that these cases conflict with the holding of the divided panel in this case.

The third basis relied upon by petitioners for grant of certiorari is simply uncontested by the Solicitor. Petitioners contend that as a result of the decision by the divided panel the law has become confused and conflicting regarding the prosecution's burden of proof in a criminal proceeding alleging violation of the EAA, a major law regulating export of commodities and technology which impacts this country's international trade, its economy, its foreign policy and national security. This claim is supported by two briefs submitted by *Amici Curiae* in support of this petition for certiorari.

One of these briefs shows that, "existing conflicts among the Circuits and resulting uncertainty in application of American Criminal Law through the enforcement of the Export Administration Act are impairing the basis for scientific discussion." Brief of the Optical Society of America, Inc. and the Society of Photo-Optical Instrumentation Engineers as *Amici Curiae* in Support of Petitioners at 3-4. In addition to this First Amendment concern, these *Amici* also stated, "The Society is further concerned that misapplication and conclusive effect of administrative assertions given by the panel may impair the Sixth Amendment jury trial rights of scientists." *Id.* at 4.

The chilling effect of the decision by the divided panel of the Ninth Circuit on free communication within the scientific community is parallelled by the far reaching adverse impacts on the United States trade in high Technology commodities that will result if this decision is not reversed. The Laser and Electro-Optical Manufactures Association (LEOMA) which represents companies that manufacture more than ninety percent

of the laser and electro-optical equipment produced in North America, characterized the issue of the government's burden of proof in criminal proceedings under the EAA as "an issue of ultimate importance to our industry, and to all of the United States industrial and high technology establishment." LEOMA Brief as *Amicus Curiae* at 2.

Thus, there can be no doubt that this case raises an unresolved issue of the highest national importance. Until there is a clear and uniform national rule on the government's burden of proof, the uncertainty will be intolerable.

Finally, petitioners also based their petition for certiorari on the ground that Judge Pregerson was correct when he held that the novel interpretation of the EAA adopted by the majority of the divided panel:

> [S]uffers from constitutional infirmities. The Fifth Amendment right to due process and the Sixth Amendment guarantees of a criminal defendant's right to trial by jury require not only that the government prove every element of a criminal offense beyond a reasonable doubt but also that each element be submitted to an impartial trier of fact.

App. 16(a). The Solicitor simply ignored these constitutional issues.

II.
THE EXCULPATORY EVIDENCE SUPPRESSED BY THE PROSECUTION WOULD HAVE BEEN ADMISSABLE

A second unusual circumstance which justifies the submission of this Reply Brief is that the Solicitor in his Brief of Opposition unveiled a new theory why petitioners were allegedly not prejudiced by the prosecution's concealment at trial of such expert witnesses as Dr. Hill and Colonel Saito who concededly would have testified that the Spawrs' mirrors were not in fact listed on the CCL. The Solicitor contends that "none of the evidence that petitioners now assert that their trial counsel

should have introduced, or that the prosecutor allegedly with held, was material or admissible." Brief in Opposition at 11. According to the Solicitor, the suppressed evidence would not have been admissible because:

> [T]he record does not reflect that any of the evidence relates to the *factual* issue framed by the Control List -- which is whether petitioners' laser mirrors were designed for CO_2 lasers whose characteristics made them subject to the validated licensing requirement [*i.e.* that the mirrors were specially designed for use with CO_2 lasers whose output exceeded 1200 watts].

Id. at 12 (emphasis in original).

The Solicitor's argument is unsound for two reasons. First, as the Brief in Opposition concedes, Dr. Hill's declaration states that had he been called as a witness at the criminal trial he would have testified that:

> [The] Spawr equipment was not an advanced technology laser mirror capable of reflecting a laser beam at the high power levels required for possible laser weapons applications . . . and . . . the items in question did not have, nor could they be adapted to have, or be redesigned and up-scaled to have weapons grade capability."

Id. at 13.

Because Dr. Hill did not spell out in his *Declaration* (Pet. App. 44a.) that the phrase, "high power levels required for possible laser weapons applications" refers to and is another way of stating the 1200 watt standard contained in the CCL, the Solicitor characterized his declaration as the opinion of a "private consultant" and concludes that such opinion would have been "inadmissible" at the trial.

On the contrary, if Dr. Hill had testified at the trial and an objection had been lodged by the prosecution to the admissibility of his testimony that the mirrors did not have and could not attain weapon grade capability, any competent

counsel could have overcome the objection by rephrasing the question to make clear that Dr. Hill's conclusion was based on the fact that the mirrors were not designed for use with CO_2 lasers whose output exceeded 1200 watts.

Further, the Solicitor does not dispute that Dr. Hill is an expert. In fact, Dr. Hill is generally regarded as the father of the high-powered laser and while employed by the United States Government as chief scientist for the U. S. Air Force Weapons Laboratory was responsible for the enactment of the 1200 watt standard. It is well settled that the opinion of a qualified expert witness is admissible as evidence in criminal proceedings to aid the factfinder in making determinations of fact. *Barefoot* v. *Estelle*, 463 U.S. 880, 903 (1982); *Spring Co.* v. *Edgar,* 99 U.S. 645, 657 (1879). If the prosecution had challenged the validity of Dr. Hill's expert opinion that the Spawr mirrors were not and could not be listed on the CCL, it would have been adduced through testimony that his conclusion was based on the fact that the Spawr mirrors were not specially designed for use with CO_2 lasers with an output exceeding 1200 watts.

Thus, the Solicitor's new argument that the testimony of Dr. Hill *et al.* would not have been admissible in evidence at the trial and hence its suppression was not prejudicial to petitioners is not well-taken, is unsupported as a matter of law and inconsistent with the facts. It is equally clear that, but for the prosecutions concealment of Dr. Hill *et al.*, the defense could have adduced substantial expert testimony to off set and rebut the prosecution witnesses. The testimony of Dr. Hill *et al.* would have been as admissible as the opinion evidence supplied by the prosecution witnesses as to whether the mirrors were specially designed for use with CO_2 lasers whose output exceeded 1200 watts. The Solicitor's inadmissibility argument is completely without merit.

The Solicitor also attempted to deprecate the importance of the prosecution's suppression of the so-called Boidock

document (*See* Pet. Cert. at 22-25.) by making the unwarranted claim that "petitioners' argument rests on a serious distortion of the contents of the documents."

Any fair and rational reading of petitioners' argument belies the notion that petitioners "seriously distorted" the contents of the document in question. That document clearly shows that the Department of Commerce did indeed make two findings of fact concerning the Spawr mirrors before the Spawrs exported them:

1. that the mirrors at the time of export had "appropriate non-strategic end use ... ;" and

2. that the mirrors at the time of export fell in the category of "Non-COCOM foreign availability" because "comparable laser mirrors are available from Mirror Techneque of Switzerland, a division of Laser Techneque of Switzerland." Pet. App. 43a.

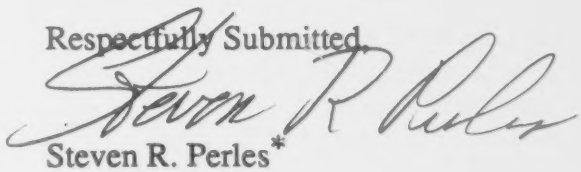
Just because these findings of fact by the Secretary of Commerce were made in a recommendation of the Department of Commerce that was subsequently rescinded as an act of comity to another Executive Branch member of the Operating Committee does not alter the fact that these findings of fact about the foreign availability and non-strategic end use of the Spawr mirrors reflected the Commerce Department's position at the time of export. There is thus no "serious distortion" in petitioners' interpretation of the document in question. The point petitioner seeks to make is that if this document had not been suppressed by the prosecution, the jury would have known that the Secretary of Commerce had found the mirrors in question had "appropriate non-strategic end use" and that they were freely available in Switzerland for purchase by Russians or any other customer of whatever nationality and thereby could not as a matter of law be listed on the CCL. It is impossible to conceive of a more exculpatory showing. The suppression of this document was fatally prejudicial to the Spawrs.

Conclusion

The Solicitor admits that he does not "subscribe to that portion of the Court of Appeals' reasoning which suggest that illegal exportation cases can never involve an issue of fact as to whether a validated license is required for a particular commodity . . ." and "the Court of Appeals may have overstated the nature of the issues on which the Secretary's determination is conclusive . . . ." Brief in Opposition at 20, 21. These admissions by the Solicitor compound the confusion that has existed since the publication of the decision by the divided panel. The *Amici* explain in detail how this confusion is inflicting a chilling effect on, *inter alia,* scientific discourse, on international trade, and on the high technology sector of United States industry. The novel reading of the EAA by the divided panel not only creates this confusion but it conflicts with the Eighth Circuits decision in *United States* v. *Gregg*, 829 F.2d 1430. It also creates unnecessary Constitutional infirmities implicating the First, the Fifth and the Sixth Amendments to the Constitution.

Petitioners pray this Court will grant certiorari to review this decision.

Respectfully Submitted,



Of Counsel
Prof. Scott C. Whitney
1307 N. Kirkwood Rd.
Arlington, VA 22201
(703) 525-5571

Steven R. Perles*
Stang & Perles
1629 K St., Suite 601
Washington, D.C. 20006
(202) 223-5730

Joan E. Teplow
400 S. Ramona Ave.
Corona, CA 91719
(714) 734-3820

*Counsel of Record